FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
APR 12 1906
JAMES H. McKENNEY,
Clerk.

No. [redacted].28

CHARLES M. TAYLOR, APPELLANT,

v.

THOMAS BURNS, JOHN A. DUNCAN, AND S. R. KAUFMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF AND ARGUMENT OF APPELLEES.

WILLIAM HERRING,
SARAH H. SORIN,
Attorneys for Appellees.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 21097

(19,776.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 275.

CHARLES M. TAYLOR, APPELLANT,

v.

THOMAS BURNS, JOHN A. DUNCAN, AND S. R. KAUFMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF AND ARGUMENT OF APPELLEES.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the supreme court of the Territory of Arizona affirming the judgment rendered in favor of appellees by the district court of the second judicial district of the said Territory in and for the county of Cochise.

On April 6, 1903, Charles M. Taylor, appellant herein, brought this action in said district court against appellees to quiet title to three mining claims situate in the California mining district, Cochise county, and known as the Victor,

Magnet, and Comet, of which the complaint alleges said Taylor to be the owner and entitled to the possession (Rec., p. 1).

Defendants filed their amended answer and cross-complaint on June 19 (Rec., pp. 5-10). The amended answer which is verified, denied that plaintiff was the owner or entitled to the possession of said claims, and set up that the defendant Burns, a citizen of the United States, was the owner thereof by virtue of the discovery and location of said claims—which location was made on the 27th day of February, 1900—and specifically alleges the performance by Burns of all of the acts required by the laws in relation to mining claims to entitle him to the ownership of said claims; that thereafter, on November 9, 1901, said Burns conveyed a one-fourth interest in said claims to said defendant Duncan, which deed was duly recorded, and that on the 9th day of March, 1903, the said defendants Burns and Duncan entered into an agreement with defendant S. R. Kaufman, trustee, for the sale of said three mining claims.

The amended answer further sets up the continuous possession of said claims by defendants since the date of said location, and that they have ever since had the ownership and right of possession thereto; that at the commencement of this action defendants Burns and Duncan were, and still are, the owners of said claims, and were, and ever since have been, entitled to the quiet, peaceable, and exclusive possession thereof (subject only to the right of defendant Kaufman under his said agreement) by virtue of said location and the compliance with mining laws.

The defendants plead the statute of limitations, alleging that the cause of action stated in the complaint did not ac-

crue within two years next before the commencement of this action. The answer concludes with a prayer for affirmative relief, that defendants be decreed to be the owners of said mining claims, etc.

The cross-complaint (Rec., pp. 7-9), also verified, sets up the facts of discovery, location, possession, and ownership of the claims substantially as alleged in the amended answer, and in addition thereto alleges:

"That defendants are credibly informed and believe, that "said plaintiff, Charles M. Taylor, makes some claim to said "mining claims adverse to these defendants; that the claim "of said Charles M. Taylor to the premises above described "is without any right, and that said Taylor has no right, "title, interest or estate whatever in and to said premises, or "any part thereof."

Defendants prayed for a decree quieting title to the premises in question and declaring and adjudging, among other things, that defendants are the owners of and entitled to the possession of said Victor, Magnet, and Comet mining claims as their several interests may appear; that plaintiff be barred and forever estopped from having or claiming any right or title to the said premises adverse to these defendants, and for general relief.

Plaintiff's verified answer to defendants' cross-complaint (Rec., p. 10) admits the allegations of the cross-complaint as to the citizenship of Burns and his discovery, location, and working of the claims, and his compliance with the laws in relation to the location of mining claims, and his performance of the annual work thereon.

The answer to the cross-complaint also admits the allegations of the cross-complaint as to the deed from Burns to

Duncan, and the agreement between said last-named defendants and Kaufman, but alleges that said deed and said agreement are subject to the rights of plaintiff thereinafter alleged. The answer to the cross-complaint then alleges the making, execution, and delivery of a deed by Thomas Burns to the plaintiff, Taylor, on the 26th day of March, 1901, conveying to said Taylor the Magnet, Comet and Victor mining claims. The alleged deed is next recited at length. The answer to the cross-complaint then proceeds as follows:

"Under which said deed the said Burns conveyed to the "said plaintiff the said mining claims for good and valuable "consideration, upon the terms and conditions of the said "deed, and that thereby the said plaintiff became the owner "of the said mining claims, subject to the payment of $45,- "000, to be paid by the said plaintiff to the said Burns, "whenever he should sell the said mining claims, and in ad- "dition thereto one-eighth of whatever price he might sell "the said property for over and above the said $45,000. "That the said plaintiff is willing and anxious to carry out "and execute the said contract and to pay to the said Burns "the said amount of money if, and whenever, the plaintiff "shall sell the said mining claims according to the terms of "said contract." (Rec., p. 11.)

The above language is quoted because of the admissions therein made. The answer to the cross-complaint concludes with a prayer for affirmative relief.

Upon the issues raised by the pleadings above referred to, the case was tried.

With regard to the statement found on page 1 of appellant's brief, regarding the expenditure of money in developing these mining claims, a reference to the pages of the record referred to (pages 48, 49, and 50) shows that the statement is not supported by the record.

It *does* appear that certain work upon these claims "was done under a bond to Mr. Randolph" (Rec., p. 49), but there is no evidence in the record of any other work done on these claims by Taylor or Randolph or any of Taylor's "associates." There is no evidence in the record of any contract between Taylor and Burns under which any work was done or moneys expended on said claims. The record contains no evidence as to any expenditures by Taylor upon these claims.

It *does* appear that Randolph had men employed on the ground during the year 1900 and a portion of 1901, the said bond being then in force, and that for about three months in each year Burns received from him for services on said claims a salary of $100 per month (Rec., pp. 49, 50).

Appellant further states on page 1 of his brief that the exact nature of said contract (under which the work was done) is not disclosed, the court upon defendants' objection having excluded plaintiff's testimony with respect thereto.

A thorough examination of the record shows that no witness was interrogated by the plaintiff in regard to the nature of the contract under which the work was done, except the witness Thomas Burns, a witness for the defendants (Rec., p. 49), who, having testified on cross-examination that the work was done under a bond to Mr. Randolph, was asked several questions regarding it by the counsel for plaintiff, all of which he was permitted to answer (Rec., pp. 49, 50).

Upon a trial, plaintiff, in support of the allegations of the complaint as to his ownership of the claims in question, offered in evidence the "Memorandum of agreement" which is set forth in his answer to the cross-complaint (Rec., pp. 10, 11), insisting that it was a conveyance whereby the

title to the mining claims in question was vested in plaintiff (Rec., p. 37).

This agreement was admitted in evidence over defendants' objection, the court, however, stating that it would not construe the instrument to be a deed or a conveyance of title (Rec., p. 38).

During the progress of the trial the plaintiff expressly abandoned his claim against the defendant Duncan (Rec., p. 39).

The instrument under which Taylor claims title was not recorded until December 15, 1902 (Rec., p. 19), while the date of the deed from Burns to Duncan was made November 9, 1901, and recorded on November 25, 1901 (Rec., pp. 29, 30).

A letter from Taylor to Burns, in which Taylor refers to the agreement above referred to as an "option" (Rec., pp. 23, 24), was admitted in evidence for defendants.

The revocation of said agreement by Thomas Burns, dated February 27, 1903 (Rec., pp. 24, 25, and 26), and the letter from Burns to Taylor enclosing a copy of said revocation (Rec., p. 26), of which letter and revocation Taylor admitted the receipt (Rec., pp. 41-26), were admitted in evidence for defendants.

The agreement of sale made between Burns and Duncan and S. R. Kaufman was admitted in evidence and is found in the record (pp. 59-61).

Appellant, plaintiff below, has contended, as appears from his pleadings above referred to, that the agreement of March 26, 1901, is a deed vesting the title to the mining claims in Taylor.

The appellees contend that the instrument amounts to

nothing more than an authorization to Taylor to negotiate a sale of said claims upon the terms therein stated; that the instrument was revocable at will, and was revoked by Burns on February 27, 1903; that in no event could said instrument be made the basis for any relief to Taylor in an action to quiet title.

The case was tried to the court, and defendants obtained a judgment quieting their title to the mining claims in question. Upon appeal, the supreme court of the Territory affirmed the judgment (Rec., pp. 71-74).

The only issue involved in this appeal is the construction of the instrument referred to.

POINTS AND AUTHORITIES.

I.

The instrument under which plaintiff claims title shows upon its face:

1. That it is styled a "Memorandum of agreement."

2. The consideration therein stated is one dollar, the receipt of which is acknowledged, and "the further consideration of money and labor heretofore expended, and of labor to be hereafter expended in and upon" the Magnet, Comet, and Victor mining claims referred to in the complaint.

3. That while the instrument does state that upon such consideration the party of the first part "*sells* to the said party of the second part the said mining claims upon the terms and conditions following, to wit," it appears that the instrument is a mere authorization to Taylor to negotiate the sale of said mining claims for any price over $45,000, and to retain as his commission seven-eighths of such excess.

4. That the party of the first part "agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims to whomsoever may purchase the same."

5. That the instrument is executed by both parties and in duplicate.

6. That it was recorded at Taylor's request, but not as a deed.

II.

The instrument under which plaintiff claims title is not a deed of conveyance. Though an instrument contains words expressing an absolute transfer, it will not be construed as a deed if by taking the whole instrument together it appears that such was not the intention of the parties. Particular words may not be isolatedly considered, but the instrument must be considered as a whole in order to ascertain the intention and obligation of the parties.

Jackson *v.* Meyers, 3 Johns., 388, 395.
Jackson *v.* Moncrief, 5 Wend., 26.
Dunnaway *v.* Day *et al.*, 63 S. W., 731.
Stewart *v.* Lang, 78 Am. Dec., 414.
Sherman's Lessee *v.* Dill, 2 *id.*, 408.
Wallace *v.* Wilcox, 27 Texas, 60, 67.
Peterson *v.* McCauley, 25 S. W., 826.
Ives *v.* Ives, 13 Johns., 236.
Jackson *v.* Clarke, 3 *id.*, 424.
Devlin on Deeds (2d ed.), sec. 7.
Williams *v.* Paine, 169 U. S., 76.
O'Brien *v.* Miller, 168 *id.*, 297.
Morrison *v.* Wilson, 30 Cal., 344.

III.

Courts will refuse to construe an instrument as a deed where from the instrument itself it is manifest that further conveyances are contemplated.

Jackson *v.* Moncrief, *supra.*
Williams *v.* Paine, *supra.*
Devlin on Deeds (2d ed.), sec. 8.
Peterson *v.* McCauley, *supra.*

IV.

The only one who can convey a good title is he in whom the title is vested.

To "convey" real estate is by a proper instrument to transfer the legal title to it from the present owner to another.

Abendroth *v.* Greenwich, 29 Conn., 365.
Cross *v.* Weare Commission Co., 153 Ill., 510; 38 N. E., 1038.

V.

Taylor himself, in his letter to Burns, written shortly before the commencement of the action, recognizes the instrument as giving him merely an option (Rec., p. 23).

VI.

A mining claim is real estate, and the title thereto can only be conveyed by deed.

Hopkins *v.* Noyes, 2 Pac., 280.
St. Louis M. & M. Co. *v.* Montana M. Co., 171 U. S., 650.
Manuel *v.* Wulff, 152 U. S., 505.
Gillis *v.* Downey, 85 Fed., 483.
Belk *v.* Meagher, 104 U. S., 279.
Harris *v.* Equator M. & S. Co., 8 Fed., 863.

Not only does our statute of frauds, paragraph 214, title 2, Conveyances, Revised Statutes of Arizona (1887), in force when this agreement was executed, provide:

"No estate of inheritance or freehold or for a term of more than one year, in lands and tenements, shall be conveyed from one to another unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing."

and paragraph 228 provide:

"The term 'land,' as used in this act, is declared to mean and include mines and mining claims."

but our statute of limitations, chapter 1, Limitation of Actions for Land, paragraph 2308, section 12, provides:

"The words 'real property,' wherever used in this act, are to be taken to mean mines and mining claims."

VII.

The authority conferred upon Taylor by the agreement of March 26, 1901 (Rec., p. 18), was not a power coupled with an interest. The interest is merely in that which is to be produced by the exercise of the power. Such an interest does not make the power irrevocable.

Hunt *v.* Rousmanier's Administrator, 8 Wheat., 174.
Mansfield *v.* Mansfield, 16 Am. Dec., 76; 6 Conn., 559.
Trickey *v.* Crowe, 71 Pac., 965.
Hall *v.* Gambrill, 88 Fed., 709.
Tinsley *v.* Dowell, 26 S. W., 948.
Blackstone *v.* Buttermore, 53 Pa. St., 266.
Hartley's Appeal, *id.*, 212.
Stitt *v.* Huidikoper, 17 Wall., 385.
Durkee *v.* Gunn, 21 Pac., 637.
Mechem on Agency, sec. 207.

VIII.

It was merely an authorization to Taylor to negotiate a sale of the mining claims for any price over $45,000, and to retain as his commission seven-eighths of such excess. No time being fixed for the duration of the contract, either party was at liberty to terminate it at will.

Trickey *v.* Crowe, *supra.*

Coffin *v.* Landis, 46 Pa. St., 426.

Sibbald *v.* The Bethlehem Iron Co., 83 N. Y., 378, 384.

John L. Rowan & Co. *v.* Hull, 47 S. E., 92.

Mechem on Agency, sec. 210.

Cadigan *v.* Crabtree, 70 N. E., 1033; 186 Mass., 7.

Knox *v.* Parker *et al.*, 25 Pac., 909.

IX.

Neither in terms nor by the nature of his contract does the principal bind himself not to revoke the authority conferred.

X.

The agent did not have the exclusive right to negotiate a sale, and therefore there was nothing to prevent the principal from making a sale of his own property.

York *v.* Nash, 71 Pac., 59.

Baars *v.* Hyland, 67 N. W., 1148.

Golden Gate Packing Co. *v.* Farmers' Union, 55 Cal., 606.

XI.

The existence of a consideration would not of itself operate to transfer the title from Burns to Taylor, and could not alter the effect of the instrument nor aid in its construction.

Mansfield *v.* Mansfield, *supra.*

XII.

There was, however, no consideration for the agreement.

1. An executed or past consideration is no consideration for a promise unless it is a promise which the law will imply.

1 Parsons on Contracts (5th ed.), 468, 472, 473.

Comstock *v.* Smith, 7 Johns., 87.

6 Am. & Eng. Enc. Law, 690-691.

2. Where there is an executory consideration in an agreement, until the performance of the condition of the promise there is no consideration and the promise is *nudum pactum.*

Miller *v.* McKenzie, 95 N. Y., 575, 579.

XIII.

As no error was assigned by appellant in the supreme court of Arizona upon the ruling of the trial court in excluding from evidence the release executed by Taylor and Beuhring, March 26, 1901, the error, if such, is waived and this court will not consider it.

See stipulation by attorney for appellant filed in this court as to assignment of errors on appeal to the supreme court of the Territory.

Union Pac. Ry. Co. *v.* Chicago, R. I. & P. Ry. Co., 163 U. S., 564.

Keyser *v.* Hitz, 133 *id.,* 138.

Grayson *v.* Lynch, 163 U. S., 468, 479.

Old Jordan Min. & M. Co. *v.* Société Anonyme Des Mines, 164 U. S., 261.

Montana Ry. Co. *v.* Warren, 137 U. S., 348.

San Pedro & C. D. A. Co. *v.* U. S., 146 U. S., 120.

XIV.

While the Revised Statutes of Arizona, 1901, do not require that on an appeal to the supreme court of the Territory an assignment of errors must be filed in the trial court, paragraph 1586 of said statutes requires that the errors be assigned in the appellant's brief.

Santa Cruz County *v.* Barnes *et al.*, 76 Pac., 621.

Said paragraph 1586 provides that the brief and argument of the appellant "must plainly state the errors complained of by him and refer to the page or pages of the record wherein the error is alleged by him to exist." (See also Rule 4, Rules Supreme Court of Arizona, 71 Pac., page VII.)

XV.

Appellant's brief contains no specification of errors such as is required by Rule 21. The attempted specification of error on page 17 of appellant's brief, in relation to the alleged rejection of evidence as to certain releases and powers of attorney, does not quote any of the rejected evidence, the names of the witnesses are not given, and there is no reference to the pages of the record where the rulings complained of are to be found. Errors not specified in accordance with the rule will be disregarded.

Portland Co. *v.* United States, 15 Wall., 1.

Benites *v.* Hampton, 123 U. S., 519.

XVI.

Where several considerations are stated in a written contract which is recited at length in the pleadings and the

pleadings contain no allegation of additional and different considerations, evidence of such additional and different considerations is properly rejected.

XVII.

Although the question whether Duncan was an innocent purchaser cannot arise in this case, evidence that he paid a valuable consideration for his conveyance, and that at the time of such conveyance he had no knowledge of the unrecorded agreement between Burns and Taylor sufficiently establishes that he was a *bona fide* purchaser.

XVIII.

The contract between Burns and Taylor did not vest in the latter any estate, right, title, or interest in the mining claims and cannot be made the basis for any relief in an action to quiet title.

ARGUMENT.

The agreement of March 26, 1901, between Thomas Burns and Charles M. Taylor (Rec., p. 18), is the sole foundation of appellant's claim to the relief demanded in the complaint.

The only issue involved in this appeal is the construction of this instrument. The appellant, plaintiff below, set it up in his answer to the cross-complaint as a deed by which the defendant Burns conveyed to him the mining claims therein referred to (Rec., p. 11).

On his appeal to the supreme court of the Territory of Arizona, the appellant contended that the instrument vested in Taylor the title to the mines (Rec., p. 72).

In his brief filed in this court the appellant contends that the instrument vested in Taylor a seven-eighths interest in the mining claims in question, which seven-eighths ownership of Taylor's is vested and indefeasible (Appellant's Brief, pages 5 and 6).

The appellees insist that the instrument is not a deed, and did not vest in Taylor any right, title, or interest to the claims referred to; that the instrument is a mere authorization from Burns to Taylor to sell and negotiate the claims for a certain price, and in the event of such sale to retain out of such purchase price a certain amount as his commission.

Appellees contend that in no event could the instrument in question be made the basis for relief to plaintiff in an action to quiet title; and, further, that whatever its force and effect may have been, it was revocable, and that it was revoked by Burns on February 27, 1903, and before Taylor had exercised the authority thereby conferred.

I.

Appellees submit that the agreement itself shows that it was a mere authorization from Burns to Taylor to negotiate the sale of the claims therein referred to upon a commission. No doubt can arise as to the purport of the instrument when the paper is taken as a whole and analyzed.

It appears upon the face of the instrument:

1. *That it calls itself a "Memorandum of agreement."*

The appellant contends that mining claims may be sold by bill of sale as well as by deed, but it is a significant fact that the parties to this instrument have designated it a

"Memorandum of agreement." We may assume from the title of this instrument that the parties thereto regarded it as neither a deed nor a bill of sale.

2. *The consideration therein stated is "the sum of one dollar, lawful money of the United States of America, in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of money and labor heretofore expended and of labor to be hereafter expended in and upon the Magnet mining claim, the Comet mining claim and the Victor mining claim, situate in the California mining district, in the Chiricahua mountains, Cochise county, Arizona Territory."*

The consideration recited in the instrument, therefore, consists, 1st, of a nominal consideration; 2d, of an executed or past consideration—"money and labor heretofore expended" in and upon said claims; 3d, "labor to be hereafter expended in and upon" said claims.

Appellant's theory that the instrument transferred the title and ownership of the mines to Taylor is certainly refuted by the character of this executory consideration. To contend that the promise of labor to be performed in and upon mines could be intended as a consideration for an instrument, the effect of which was absolutely to divest the owner of his title to those very lands, and therefore of all interest in the performance of such labor, would be an absurdity.

3. *That while the instrument does state that upon such consideration the party of the first part "sells to the said party of the second part the said mining claims upon the terms and conditions following, to wit:", it appears that the instrument is a mere authorization to Taylor to negotiate the*

sale of said mining claims for any price over $45,000, and to retain as his commission seven-eighths of such excess.

The terms and condition referred to are as follows:

"The said party of the second part shall pay to the party of the first part, whenever he shall negotiate, sell or place said mines to any assignee of the said party of the second part, forty-five thousand dollars ($45,000.00) and in addition thereto one-eighth (⅛) of whatever price the said party of the second part may be able to sell, place or negotiate the said mines, for a consideration in excess of said $45,000.00."

The instrument, after having stated that the party of the first part sells to the said party of the second part the said mining claims upon the terms and conditions just recited and quoted, next proceeds to give in unmistakable language the interpretation which the parties themselves placed upon the instrument, as follows:

"that is to say, the party of the second part is authorized to sell and negotiate the said mines for any price above the said sum of $45,000.00, and may retain out of said purchase price seven-eighths (⅞) of said selling price above such sum of $45,000.00."

If, therefore, from the language previously employed in the instrument any doubt could arise as to its purpose and effect, such doubt is wholly dissipated by the language last above quoted.

The clause just quoted is "in its very terms an exposition of the sense in which the words making up the first clause are used by the parties." The clause just quoted is but a *videlicet* (Morrison *v.* Wilson, 30 Cal., 344).

It is evident that it is solely from the fact that Taylor is authorized to retain seven-eighths of the selling price above the sum of $45,000 that the appellant argues that the instrument conveyed to Taylor a seven-eighths interest in the mines, as there is no language found in the instrument which in terms refers to the transfer of such interest. If the appellant's reasoning could be upheld, it would follow that where an agent is permitted to make a sale and retain as his commission *all* over a certain figure, it would necessarily result that the agent thereby becomes the sole owner of the property.

It is true that the instrument provides that—

"The said parties hereto hereby mutually agree to aid each other in the negotiation and sale of said mining claims, to the end that the same may be sold and the consideration realized as quickly as possible."

We submit that there is nothing in this language at all inconsistent with the defendants' contention that the instrument is a mere authorization to sell. The owner was presumably anxious that a sale should be effected, and the agent that his commission should be earned.

4. *That the party of the first part "agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims to whomsoever may purchase the same."*

This language sufficiently shows that the instrument was not regarded as transferring the title of the claims to Taylor. Its only effect is to provide that if Taylor finds a purchaser for the mines at the price fixed by the owner, the owner will convey his title to the purchaser.

5. *That the instrument is executed by both parties and in duplicate.*

This fact further supports the contention of appellees that the instrument is not a deed.

6. *That it was recorded at Taylor's request, but not as a deed.*

The endorsement upon the agreement (Rec., p 19) shows that it was filed and recorded in the recorder's office, Tombstone, Cochise county, Arizona, at request of Charles M. Taylor, December 15, 1902, in Book 6, Miss. (Misc.) Records, page 474.

II.

The instrument under which plaintiff claims title, the said agreement of March 26, 1901, is clearly not a deed of conveyance. In contending that the instrument is a deed, the appellant's main reliance is upon the use therein of the word "sells." However, particular words may not be isolatedly considered, but the instrument must be considered as a whole in order to ascertain the intention and obligation of the parties (O'Brien *v.* Miller, 168 U. S., 297).

An instrument will not be construed as a conveyance, though it contains words of present purchase and sale, if upon construing those words in reference to the whole instrument it appears that such was not the intention of the parties (Jackson *v.* Moncrief, 5 Wend., 26).

In the case of Jackson *v.* Meyers, 3 Johns., 386, 394, it is held that "the intent, when apparent and not repugnant to any rule of law, will control technical terms; for the intent, and not the words, is the essence of every agreement."

Where an instrument declared on as a deed and styled an indenture recited that for a certain consideration "the parties of the first part * * * have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said party of the second part, and to its successors and assigns," certain property upon conditions thereinafter stated, the supreme court of Missouri held that, notwithstanding the words "grant, bargain and sell" in such instrument, it was a mere option (Dunnaway *v.* Day *et al.*, 63 S. W., 731).

Where the strongest words in an instrument were these: "I, James Henderson, have this day sold and delivered to J. H. Fowler, his heirs and assigns forever, * * * and hereby bind myself, my heirs and executors, to make a good warranty deed to the same," etc., it was held that it did not contain words indicating a conveyance of title *in præsenti* (Peterson *v.* McCauley, 25 S. W., 826).

In the case last cited the court comments upon the fact that there is no *habendum, redendum,* warranty, or other clause usually found in deeds of conveyance. These elements are also lacking in the instrument here under consideration. And "The strongest words of conveyance in the present tense will not pass an estate if from other parts of the instrument, a contrary intent be apparent." (Devlin on Deeds (2d ed.), sec. 7.)

Under the authorities cited it is clear that the effect of the instrument is not to be controlled by an isolated expression. If the instrument, taken as a whole, shows that a legal term is obviously employed in a sense contrary to its usual meaning, the intention must control (Morrison *v.* Wilson, 30 Cal., 344).

And the subsequent language of the instrument,

"that is to say, the party of the second part is authorized to sell and negotiate the said mines for any price above the said sum of $45,000.00, and may retain out of such purchase price seven-eighths (⅞) of said selling price above such sum of $45,000.00,"

clearly shows that the instrument was not intended to affect a transfer of the title.

The plaintiff, having declared on this instrument as a deed, cannot properly object that there should be applied to it the tests applicable to such an instrument.

Under the authorities above cited it is manifest that, upon a consideration of the whole instrument, the word "sells" cannot have the force and effect which appellant claims for it.

III.

The instrument itself furnishes us with a further reason why it cannot be construed as a deed.

Burns, the owner of the claims, agrees to execute any deeds or conveyances that may be necessary to convey a good title to said claims to whomsoever may purchase the same. This agreement on the part of Burns and the contention that by this instrument he divested himself of his title are entirely repugnant.

Courts have uniformly refused to construe an instrument as a deed where from the instrument itself it is apparent that further conveyances are contemplated.

This rule is laid down in Devlin on Deeds, section 8, and the court so held in the cases of Jackson *v.* Moncrief, Williams *v.* Paine, and Peterson *v.* McCauley, *supra.*

IV.

The only one who could convey a good title is he in whom the title was vested.

The location of the claims by Burns and his performance of the annual work thereon, the acts necessary to constitute him the owner of the claims, are admitted by the pleadings (Rec., p. 10).

The only right the plaintiff seeks to maintain in this action is such right as was derived from the agreement of March 26, 1901. It is apparent that the significance of the term "convey" as employed by the parties to this instrument was properly understood. From the context it is clear that they recognized the necessity of a deed from Burns, the owner, to the purchaser whom Taylor might find, in order to convey or transfer the legal title from Burns to such purchaser. To "convey" real estate is by a proper instrument to transfer the legal title to it from the present owner to another (Abendroth *v.* Greenwich, 29 Conn., 365; Cross *v.* Weare Commission Co., 153 Ill., 510; 38 N. E., 1038).

V.

In a letter written by the appellant Taylor to Burns shortly before the commencement of this action we find that Taylor recognizes the instrument as giving him merely an option (Rec., pp. 23, 24). It will be noted that the date of this letter, February 23, 1903, is subsequent to the agreement of March 26, 1901. On page 40 of the record the witness Burns testified that he got a letter from Taylor about that agreement. This letter was offered in evidence and marked Defendants' Exhibit No. 1. So that it is clear that

the instrument referred to in the letter is the agreement now under discussion, and the letter itself refers to a copy of a paper enclosed and quotes certain portions of the agreement of March 26, 1901. Taylor refers in this letter to "these three claims (which I have an unlimited option on, as the enclosed paper will show you)." And he subsequently refers to these claims by name as the Magnet, Victor, and Comet. Further on in the same letter we find the following language: "I feel sure that I can make a deal with the whole group if you will be reasonable with me, but if you don't want me to try to sell the claims which I have no option on, why so good, but I am determined to bond the three which I have an option on to the first party that comes along who means business, and will bond for more than $45,000.00, which will leave me a fair profit, after the $45,000.00 has been paid to you." (Rec., p. 24.)

Argument is unnecessary to show that a construction placed upon the terms of an instrument by one of the parties thereto, against his own interest, and wholly at variance with the construction which he is now claiming for the instrument, is binding upon him.

VI.

The appellant contends in his brief that a mining claim under our statute may be sold by a bill of sale.

This court has said in the case of St. Louis M. & M. Co. *v.* Montana M. Co., 171 U. S., 650, "Where there is a valid location of a mining claim, the area becomes segregated from the public domain, and the property of the locator."

"A location as provided by law, and possession and compliance with the local rules and customs, gives to the locator

such an interest in the ground located, as that the Government has no interest or estate therein that can be granted or conveyed to any other person; and in such a case the Government holds the naked title in trust for the locator or his assigns." (Hopkins *v.* Noyes, 2 Pac., 280. See also Manuel *v.* Wulff, 152 U. S., 505, and Gillis *v.* Downey, 85 Fed., 483.)

The Arizona statutes in relation to conveyances and also in relation to limitations in force at the time of the execution of this agreement (which sections are quoted at length under point VI, *supra*) clearly indicate that the owner of a mining claim is the owner of an estate in lands, and that a deed of conveyance is the only proper method of conveyance by which the title of the locator can be transferred.

The rights in mineral lands granted to the locator by section 2322, Revised Statutes of the United States, descend to his heirs (Belk *v.* Meagher, 104 U. S., 279).

An estate of inheritance, we suggest, is not properly transferred by a bill of sale. The fact that appellant has brought an action to quiet his alleged title to these mining claims destroys the effect of his contention that they may be transferred as personal property.

VII.

The appellant contends that, whatever the court may decree this instrument to be, it vested in Taylor a "right coupled with an interest," and therefore was not revocable at the will of Burns. What he may mean by a "right coupled with an interest" is not explained; but if he claims that the instrument vested in Taylor a power coupled with an interest, the case of Hunt *v.* Rousmanier's Administra-

tor, 8 Wheat., 174, which he cites, is directly opposed to his contention.

The only interest which Taylor has in the instrument under consideration, or which he can derive thereunder, is an interest in the proceeds of the sale of the mines which he is authorized to make. The interest which can make a power irrevocable is an interest in the thing which is the subject of the power.

As stated by Chief Justice Marshall in Hunt *v.* Rousmanier's Administrator, *supra,* in discussing the essential elements of a power coupled with an interest:

"A power must be engrafted on an estate in the thing. * * * 'A power coupled with an interest' is a power which accompanies, or is connected, with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be 'coupled' with it."

The court further proceeds:

"The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name."

In the case of Hall *v.* Gambrill, 88 Fed., 709, the court had under consideration whether the fact that a power to sell land which authorizes the agent to retain a percentage of the purchase-money in payment for his services makes it a

power coupled with an interest. The court, after considering the case of Hunt *v.* Rousmanier's Administrator, uses the following language:

"Applying the principle as stated by Chief Justice Marshall,—the power ceases when the interest commences, and therefore cannot be coupled with it,—can it be said that Hall had an interest in the contract until he exercised the power to sell? Clearly, he had no interest that would accrue to him until after the sale was made. His commissions were the only interest he had, under the contract, and the same were contingent upon a sale. * * * A failure to sell before a revocation of the power would terminate all interest he had under the contract, which clearly shows that his interest was contingent on being able to sell the land, and was in no sense an interest running with the land."

A mere interest in the results or proceeds of the execution of an authority, as by way of compensation, is not enough.

"Thus, where one is given authority to sell the lands or other property of another, and is to have a certain commission or share out of the proceeds for making the sale, the authority may be revoked at the will of the principal, even though in terms it was declared to be exclusive or irrevocable; and so where one was authorized to collect a debt, and was to have one-half of what he collected for his services, the power was held not to be coupled with a sufficient interest, and was therefore revocable by the principal at will. The interest in the commission to be earned and in the moneys expended in endeavoring to carry out the agency, is not sufficient to prevent revocation." (Mechem on Agency, sec. 207.)

The supreme court of Arizona in the recent case of Trickey *v.* Crowe, 71 Pac., 965, expressly held that an authority to sell a mining claim on commission is not an au-

thority coupled with an interest. To the same effect are Mansfield *v.* Mansfield, 6 Conn., 559, Blackstone *v.* Buttermore, 53 Pa. St., 266, and other authorities cited under Point VII.

It is not claimed by appellant in the present case that before the execution of the contract of March 26, 1901, Taylor had any interest whatever in either the Magnet, Comet, or Victor claims. The rights which he is here seeking to enforce are those derived under that contract. It therefore devolves upon him to show that the instrument conveyed to him an interest in the property—an "estate in the thing"—so that his power or authority is coupled with an interest in the subject of the power. The contract confers upon him a power to sell, but it does not grant an interest in the mining claims to be sold by him. As his only interest is in the proceeds to arise from the sale of the mines—that is to say, from the exercise of the power conferred by the instrument—it is clear under the authorities cited that the power cannot be held to be coupled with his interest. It is only after the power is exhausted that the interest is created.

VIII.

As the agreement amounts only to an authorization to Taylor to negotiate a sale of the mining claims for any price over $45,000.00, and to retain as his commission seven-eighths of such excess, and as no time is fixed for the duration of the agency, either party was at liberty to terminate it at will (Trickey *v.* Crowe, *supra*).

Unless the authority of an agent is coupled with an interest in the property itself which is the subject of the power, the authority of the agent may be revoked by the principal

at his will at any time, and this is true even though the authority be in express terms declared to be "exclusive" or "irrevocable" (Mechem on Agency, secs. 204, 210).

"Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirement of good faith." (Sibbald *v.* The Bethlehem Iron Co., 83 N. Y., 378, 384.)

It is admitted by the pleadings in the present case that Taylor had not made a sale of the property under the contract referred to (Rec., p. 11). Plaintiff alleges "That the said plaintiff is willing and anxious to carry out and execute the said contract, and to pay to the said Burns the said amount of money if and whenever the plaintiff shall sell the said mining claims according to the terms of said contract." We are here considering the *power* of the principal to revoke the authority conferred by the agreement referred to. The question of the liability to which a principal might subject himself by exercising such power contrary to his expressed or implied agreement in the matter does not arise in the present action and could only arise in an action brought by Taylor for commissions earned under the contract or in an action for damages for its breach. We have not that case. The only question before this court is, whether by the terms of that agreement Taylor was vested with a title to the property. As the authorities collected under Point VIII, *supra,* simply reiterate the rule as laid down in Mechem on Agency, we do not here refer to them separately.

It is well settled that where the agent has no interest which would accrue to him until after the sale is made, his failure to sell before a revocation of the authority or power to sell

would terminate the interest which he had under the instrument. From the failure of the parties to limit by the terms of the agreement the time within which the authority was to be exercised, it is to be inferred *not* that the power was irrevocable, but that the right to terminate it at any time was reserved.

Parties having entered into a relation which is revocable at pleasure unless otherwise expressly stipulated must have contemplated a termination of the authority (Coffin *v.* Landis, 46 Pa. St., 426).

Unless the agreement under consideration contains an express covenant binding Burns to accept and ratify a sale by the plaintiff for any price above the sum of $45,000.00, *made at any time*, he could before such sale was made withdraw and revoke Taylor's authority to sell (Stitt *v.* Huidikoper, 17 Wall., 398).

IX.

It is clear that the contract does not expressly provide that the authority shall not be revoked; neither is this to be inferred from the nature of the contract. The contention of appellant that by this agreement Burns gave Taylor the perpetual right to sell the property is too absurd, we submit, to require refutation. The supreme court of the Territory in the case of Trickey *v.* Crowe, *supra*, has held that a contract of the character now under consideration is revocable.

X.

It is urged by appellees that even an exclusive agency to negotiate a sale cannot prevent the owner himself from selling his own property. Such a sale is not even a breach of the contract of agency, and the granting of such an agency

could certainly not have the effect of transferring the title from the principal to the agent (York *v.* Nash, 71 Pac., 59; Baars *v.* Hyland, 67 N. W., 1148; Golden Gate Packing Co. *v.* Farmers' Union, 55 Cal., 606).

XI.

The appellant apparently considers that because the authority is stated to have been given for a consideration, it therefore operates to transfer the interest in the mining claims from Burns to Taylor and is a power coupled with an interest. As said by Chief Justice Marshall in the case of Hunt *v.* Rousmanier's Administrator, *supra:*

"The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name."

We are referred to no authorities which hold that the fact that the authority is conferred upon the agent for a consideration of itself operates to transfer to the agent the title to the property which is the subject of the agency. The question of consideration, we submit, would be entirely immaterial, except as affecting the agent's right to damages, in a suit brought against the principal for a breach of the contract. The existence of a consideration could not determine the construction of the contract. In the case of Mansfield *v.* Mansfield, *supra,* in which the court was considering a power of attorney which it was contended was coupled with an interest, the court uses the following language:

"As it is not pretended, that before the execution of the power of attorney to Messrs. Ingersoll and Hitchcock, they had any interest in the estate confided to their care, they of

consequence have it devolved on them to show, that the instrument constituting them attorneys conferred on them an interest in the property, so that their power was coupled with an interest. On a construction of the instrument, according to the form of its expressions, and the object of the parties, I see no ground for this position. It professes to have been executed, in consideration of a preceding indebtedness; but I am not aware that this gives any aid in its construction. A power without consideration is equally valid as with one; and the expression means no more than that the indebtedness was the inducement operating on Mrs. Mansfield in conferring the power in question. We must look to other parts of the instrument to ascertain whether it trasferred any interest. * * * It has been established law, from before the days of Sir Edward Coke to the present time, that a power to sell and convey is a naked power, and revocable." (Mansfield *v.* Mansfield, 6 Conn., 559.)

The fact that a consideration is paid for a thing or for an authority does not alter the inherent nature of the thing itself. Whatever Taylor paid to Burns as the consideration for the agreement, all that he got was the authority from Burns to sell the mines upon the conditions stated in the instrument.

XII.

While appellees contend that the existence of a consideration for the contract of March 26, 1901, is entirely immaterial so far as the present case is concerned, the attention of the court is drawn to the fact that there was no consideration for the agreement.

1. It is well settled that an executed or past consideration is no consideration for a promise unless it is a promise

which the law will imply (1 Parsons on Contracts (5th ed.), 468, 472, 473).

The past consideration referred to is "money and labor heretofore expended * * * in and upon the Magnet mining claim, the Comet mining claim, and the Victor mining claim." (Rec., p. 10.)

Even had the money and labor been expended by Taylor upon the claims at Burns' request, the law would not imply from such fact a promise on the part of Burns to authorize Taylor to sell the property. There is no allegation in the pleadings and no evidence in the record that money and labor were so expended. On the contrary, it appears (Rec., p. 49) that "the work was done under a bond to Mr. Randolph." It also appears that the men employed to do the work were employed by Mr. Randolph (Rec., p. 48), and there is no evidence that any money or labor was expended upon the property prior to March 26, 1901, except under such bond. There is no evidence that Taylor ever expended any money on the property. It is a matter of common knowledge, of which the trial court and this court will take judicial notice, that in Cochise county, in which this suit was tried, the mining business and mining interests are paramount. The nature of a bond on a mining claim is also a matter of common and general understanding, as is also the fact that the work performed upon a claim by a man who takes a bond on it, as did Randolph, is done for his own convenience and at his own expense, in order that he may determine and satisfy himself whether the property is of sufficient value to justify its purchase.

The previous expenditure of money and labor, therefore, is not a consideration for an express promise to authorize a

sale of the property and allow a commission therefor; and especially is this the case where the authority is conferred upon a person other than he who expended the money and labor. (See also Comstock *v.* Smith, 7 Johns., 87; 6 Am. & Eng. Enc. Law, 690, 691.)

2. A portion of the consideration stated in this agreement is executory—"labor to be hereafter expended in and upon" the said three claims (Rec., p. 18). In the revocation of Taylor's authority by Burns, Defendants' Exhibit 2 (Rec., p. 24), given in evidence by the defendants (Rec., p. 41), the following language is found:

"And whereas the said Charles M. Taylor since said authorization to sell, negotiate or place said mines has wholly failed to expend any labor upon the said Magnet, Comet and Victor mining claims or in or upon either of said claims and has wholly failed and neglected to negotiate, sell or place said mines or either of them:

"Now, therefore, the authorization to the said Charles M. Taylor mentioned and referred to in said agreement, to sell and negotiate the said mines and every of them is hereby withdrawn, revoked, canceled and annulled."

The statement here found as to Taylor's failure to expend any labor on the claims since the authorization to sell on March 26, 1901, is nowhere contradicted.

It appears, therefore, that the executory consideration wholly failed, and that the labor referred to was never performed. Where there is an executory consideration in an agreement, there is no consideration and the promise is *nudum pactum* until the performance of the condition of the promise (Miller *v.* McKenzie, 95 N. Y., 575, 579).

XIII.

We find in appellant's brief the following statement on page 17:

"The court erred in not allowing Taylor to show that contemporaneous with this contract there were executed releases of all prior obligations of Burns to Taylor, and also a surrender of all powers of attorney and other documents previously held by him from Burns."

Passing by for the moment the question of the insufficiency of this statement as a specification of error under Rule 21, we draw the attention of the court to the fact that on appeal from the district court of Cochise county to the supreme court of Arizona there was no assignment of error presented to the supreme court of Arizona in relation to the rejection of any release, and appellees urge that inasmuch as this court is here reviewing the judgment of the supreme court of Arizona, it will not now consider an error which was not complained of or assigned in that court. As, therefore, the question of the rejection of any release as evidence was not assigned as error in the supreme court of Arizona, the court will not consider it (Union Pac. Ry. Co. *v.* Chicago, R. I. & P. Ry. Co., 163 U. S., 564, 593).

This court has said in the case of Old Jordan M. & M. Co. *v.* Société Anonyme Des Mines, 164 U. S., 261, 264, that it can only be called upon to consider such assignments as are pressed upon the attention, or noticed in the opinion, of the court below.

In the case of San Pedro & C. D. A. Co. *v.* U. S., 146 U. S., 120, it was held that if error was to be predicated upon any ruling of the supreme court of the Territory, that such error shall affirmatively and distinctly appear.

In another case in which this court was reviewing the judgment of the supreme court of the Territory of Montana (Montana Ry. Co. *v.* Warren, 173 U. S., 348), it was held that the inquiry of this court is limited to the matters presented to and considered by the supreme court of the Territory.

Since the adoption of the Revised Statutes of Arizona, 1901, an appellant from the district court to the supreme court of the Territory has not been required to file an assignment of errors in the trial court, and the supreme court of the Territory has held in Santa Cruz County *v.* Barnes *et al.*, 76 Pac., 621, that it is sufficient that the assignment of errors should appear in the appellant's brief. Paragraph 1586, Revised Statutes of Arizona, 1901, provides that the brief of appellant "must plainly state the errors complained of by him and refer to the page or pages of the record wherein the error is alleged by him to exist."

Rule 4, subdivision 2, Rules Supreme Court of Arizona (71 Pac., page VII), also requires that the brief of appellant or plaintiff in error shall contain, in the following order and separately stated:

"(1) A concise statement of the case, presenting succintly the questions involved and the manner in which they are raised.

"(2) An assignment of the errors relied upon.

"(3) The argument, exhibiting a clear statement of the points of law, or facts to be discussed, under each assignment of error relied upon, with a reference to the folios of the abstract of the record that are pertinent thereto, and the authorities relied upon in support thereof."

As no assignment of error was filed by the appellant in the trial court (in which case it would have become a part

of the record on appeal to the supreme court of the Territory—Santa Cruz County *v.* Barnes *et al., supra*), and as under our present practice the assignment of errors is only contained in the appellant's brief, the appellees herein have procured from Mr. Eugene S. Ives, the attorney for the appellant, and filed in this court a stipulation as to the assignment of errors on appeal to the supreme court of the Territory, to which the court is respectfully referred. The briefs of appellant filed in the supreme court of the Territory are made a part of such stipulation, and it therein appears that no error was assigned upon the rejection from evidence of any release.

XIV.

Not only did appellant fail to bring to the attention of the supreme court of Arizona any ruling of the trial court regarding the rejection of any release offered in evidence by plaintiff, but appellant's brief filed in this court contains no specification of errors such as is required by Rule 21.

If the statement referred to on page 17 of his brief and above quoted is to be regarded as an attempted specification of error, it wholly fails to meet the requirements of the rule. The rejected evidence is not quoted. The names of the witnesses are not given. There is no reference to the pages of the record where the rulings complained of are to be found. Where such is the case, the error, if such, will be disregarded (Portland Co. *v.* United States, 15 Wall., 1; Benites *v.* Hampton, 123 U. S., 519).

Error should be specified with precision. Without searching through the entire evidence in the record, there is no means of ascertaining what particular rulings the appellant

complains of. We respectfully suggest that no duty rests upon the court or upon opposing counsel to make such investigation.

From the statement found on page 3 of appellant's brief, that it will therefore be unnecessary to consider in detail the exceptions to the rulings of the court upon evidence, and as no rulings upon the admission or rejection of evidence are specified as provided by Rule 21, we must assume that appellant himself does not regard his brief as presenting for the consideration of this court any questions upon the admission or rejection of evidence.

XV.

From appellant's further statement on page 17, it appears that "all these things (*i. e.,* the rejected evidence) tend to show the magnitude of the consideration, what the consideration was."

Even had the question of the exclusion of such evidence been properly raised by appellant in his brief, we submit that the contract was set forth in appellant's pleading *in hæc verba* (Rec., pp. 10, 11).

The consideration is specifically and fully set forth in the instrument itself. The pleadings of plaintiff contain no allegation of any further or additional consideration. Conceding that under our present statute a written instrument imports a consideration, and that where none is expressed the real consideration, if necessary to be shown, can be proven *under proper allegations in the pleadings*, appellees insist that where, as in the present case, the instrument specifically stating the consideration and purporting to state the entire consideration is set up in the pleadings, and there

are no proper allegations in such pleadings of an additional and different consideration, that evidence that there were additional and entirely different considerations, such as (in the language of appellant's brief, p. 17) "releases of all prior obligations and a surrender of all powers of attorney and other documents previously held by him from Burns," would be properly rejected. Such evidence sheds no light upon issues made by the pleadings, and is therefore irrelevant. It would vary the written contract by parol, and is therefore incompetent. The existence of a consideration, as hereinbefore contended by appellees, would not operate to divest Burns of his title and convey it to Taylor, and therefore such evidence, if received, would be immaterial; and, further, had such evidence been admitted, the result must have been to establish a different contract from that declared on by appellant, and the variance resulting would have been fatal.

XVI.

Inasmuch as the contract of March 26, 1901, vested no interest in the mines in Taylor, the rights of defendant Duncan under his deed from Burns (Rec., p. 29) and the rights of Kaufman under his agreement of sale from Burns and Duncan could not be affected thereby. While it is, therefore, unnecessary to discuss the appellant's proposition that the answers and cross-complaints of such defendants do not set forth facts sufficient to establish rights as *bona fide* purchasers without notice, we beg to draw the attention of the court to the fact that it is only in plaintiff's answer to the cross-complaint that anything is alleged regarding this contract.

Allegations of the cross-complaint (Rec., p. 8) as to the

conveyance from Burns to Duncan of an undivided one-fourth interest in the claims and the allegation as to the agreement between Burns, Duncan, and Kaufman, trustee, for the sale of said three claims are admitted (Rec., p. 10); but the plaintiff alleges that the deed from Burns to Duncan and the contract between Burns, Duncan, and Kaufman are subject to the rights of the plaintiff.

Under paragraph 1357, Revised Statutes Arizona, 1901, "It shall not be necessary for the plaintiff to deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied unless expressly admitted." The allegations of the plaintiff's answer were therefore deemed denied. The court's attention has been drawn by us to the admission by Mr. Barnes, counsel for plaintiff (Rec., p. 39):

"By Mr. BARNES: I find that I will have to abandon my claim against Mr. Duncan. I am satisfied that I can't prove his actual knowledge. I thought I could by Mr. Burns, but I find that I can't do it."

Afterwards, when Mr. Duncan was on the stand and had testified as to the deed for his one-fourth interest, and said deed had been admitted in evidence (Rec., p. 56), and the witness had testified that at the time of the conveyance to him he had no notice or knowledge of the agreement between Burns and Taylor, on cross-examination by Mr. Barnes, counsel for appellant, he testified as follows:

"Q. You say that at the time this deed was made to you you had no knowledge of any contract between Taylor and Burns?

"A. Yes sir.

"Q. That deed was given to you for the consideration expressed in the deed?

"A. Yes sir." (Rec., p. 57.)

The Record, page 19, shows that the agreement between Taylor and Burns was not recorded in the recorder's office, Cochise county, until December 15, 1902.

As Duncan's deed was in evidence and the consideration stated therein was "one ($1.00) dollar, and for other valuable considerations to me in hand paid by John A. Duncan," etc., (Rec., p. 29), the evidence elicited by the appellant's counsel shows that a valuable consideration was paid by the purchaser.

Mr. Burns testified (Rec., p. 43) that from the time of the location of those mines up to the last few months, he had been in possession. As, therefore, Duncan is shown by uncontradicted evidence, admitted without objection, to have paid a valuable consideration for the conveyance of his one-fourth interest, and to have been a purchaser in good faith, we respectfully suggest that the appellant's contention is without foundation.

The case, we submit, presents no foundation whatever for appellant's theory that the instrument expresses the intention of the parties that "Burns was to give Taylor the right perpetually to sell the entire eight-eighths interest in the property, with the sole limitation that he should not make such sale for less than $45,000.00." (Appellant's Brief, p. 5).

Such a theory is entirely destroyed by the unmistakable language of the instrument itself. It is to be noted that Taylor never effected a sale of the property, and by the terms of the instrument is not bound ever to effect a sale, or to pay the purchase price or any part of it to Burns; there is no mutuality about the contract. From the language at the conclusion of the contract, that it is "to take the place of and supersede any and all contract or contracts heretofore

made by the said parties hereto with reference to said mining claims," nothing further is to be inferred than that this contract was regarded by the parties as the final and definite expression of their agreement with regard to these three claims.

Taking the instrument as a whole, appellees contend that it amounts merely to a naked authority to sell. All that Taylor could have derived under it in any event was his commissions. It is most certainly neither a deed nor a "power coupled with an interest."

In conclusion, we submit that appellant has wholly failed to establish any right or title to the mining claims of which he claims to be the owner. The contract which he sets up in his pleadings, and which he offered in evidence as the foundation of his alleged right to relief, is wholly ineffectual to vest in him any right or title to the premises in controversy or to entitle him to any relief whatever in this action.

The judgment of the supreme court of the Territory of Arizona should be, therefore, affirmed.

Respectfully submitted,

WILLIAM HERRING,
SARAH H. SORIN,
Attorneys for Appellees.